SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1202

W. D. HADEN COMPANY,

Petitioner,

vs.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The prior decisions of the Circuit Court of Appeals as to the interpretation of the exemption contained in Section 13 (a)(3) of the Fair Labor Standards Act of 1938 have been solely based on whether or not such employees were seamen within the ordinary meaning of the term and there are conflicts by such courts which have never been settled by the Supreme Court, although prior to the enactment of the Act there were no such conflicts.

Dredge employees were held to be "seamen" in every adjudicated case prior to the enactment of the Fair Labor Standards Act of 1938, wherein the courts were interpreting

the word "seamen" as it applied to other statutes. The Supreme Court held that dredge employees were seamen under the Eight Hour Day Act;[1] dredge employees were held to be entitled to a seaman's lien by virtue of their status as seamen; an engineer on a dredge,[2] pipemen on dredges,[3] deckhands,[4] scowmen and cooks on dredges,[5] dipper tenders,[6] here all held to be entitled to seamen's liens; in a later case a deckhand on a dredge was held to be a seaman within the meaning of the Merchant Marine Act and Longshoremen's Compensation Act,[7] and a deckhand on a dredge was to be a seaman within the meaning of the Jones Act;[8] dredge employees were held to be entitled to Maritime liens where the company was in bankruptcy.[9] Dredge-boats have been held to be subject to documentation under the laws of the United States and licensed to engage in coastal trade.[10] They have been held to be subject to inspection by the Bureau of Marine Inspection and Navigation.[11] A breach of discipline aboard a dredge is mutiny.[12]

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[1] *Ellis* v. *United States*, 206 U. S. 246.

[2] *The Atlantic*, 53 Fed. 607 (D. S. C.).

[3] *McRae* v. *Bowers Dredging Co.*, 86 Fed. 344 (D. Wash.).

[4] *Saylor* v. *Taylor*, 77 Fed. 476 (C. C. A. 4).

[5] *Supra* (4).

[6] *The Hurricane*, 2 Fed. (2d) 70 (E. D. Penn.).

[7] *Kibadeaux* v. *Standard Dredging Co.*, 81 Fed. (2d) 670 (C. C. A. 5), certiorari denied 299 U. S. 549.

[8] *Pariser* v. *City of New York*, 146 Fed. (2d) 431 (C. C. A. 2).

[9] *Butler* v. *Ellis*, 45 Fed. (2d) 591 (C. C. A. 4).

[10] *In re Penglase Sand and Gravel Co.*, 76 Fed. (2d) 593 (C. C. A. 7).

[11] *Supra*.

[12] *In the Matter of United Dredging Company* and *Inland Boatmen's Division, National Maritime Union*, Case No. C-1432 of the National Labor Relations Board, and Case No. 10085 of the docket of this Court following *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31, 62 S. Ct. 886.

Time and again the Federal Courts have held that dredge workers are seamen [13] and that dredges are vessels.[14]

Even after the enactment of the Fair Labor Standards Act, there seems to be no question but that dredge employees were seamen. An early interpretative bulletin issued by the Wage and Hour Department construed them as seamen.[15] One of the first cases reported by the Courts on the interpretation of this question under the Fair Labor Standards Act held that barge-tenders were seamen.[16] Following this decision, it was held by a Federal District Court in Massachusetts that a deckhand on a dredge was a seaman within the meaning of the Fair Labor Standards Act.[17]

It was not until April, 1945, that the Federal Courts reported a contrary holding. In the case of *Anderson* v. *Manhattan Lighterage Corporation*,[18] decided by the Second Circuit, the judgment of the District Court holding that lighter captains were seamen was disapproved and

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[13] *Saylor* v. *Taylor*, 77 Fed. (2d) 476 (C. C. A. 4).
The Hurricane, 2 Fed. (2d) 70 (D. C. Penna.), affirmed 9 Fed. (2d) 396 (C. C. A. 3).
Ellis v. *United States* (see note (1) *supra*).
Kibadeau v. *Standard Dredging Co.* (see note (7) *supra*).
Maryland Casualty Co. v. *Lawson*, 94 Fed. (2d) 190 (C. C. A. 5).

[14] *City of Los Angeles* v. *United Dredging Co.*, 14 Fed. (2d) 364 (C. C. A. 9), cited with approval by the Supreme Court of the United States in *Norton* v. *Warner*, 321 U. S. 565, 64 S. Ct. 747, 88 L. Ed. 931.
The International, 89 Fed. 484 (C. C. A. 3).
The Starbuck, 61 Fed. 502 (D. C. Penna.).
The Atlantic, 53 Fed. 607 (D. C. S. C.).
Butler v. *Ellis*, 45 Fed. (2d) 951.
The Dredge Alabama, 19 Fed. 544 (D. C. Ala.).

[15] Wage and Hour Release No. R-899, issued July 12, 1940.

[16] *Gale, et al.* v. *Union Bag and Paper Corp.*, 116 Fed. (2d) 27 (C. C. A. 5), writ refused 313 U. S. 559, 61 S. Ct. 837.

[17] *Bolan* v. *Bay State Dredging and Construction Co.*, 48 FS 266 (D. C. Mass.)

[18] 148 Fed. (2d) 971 (C. C. A. 2), cert. den. 66 S. Ct. 27.

thus first began the reversal of policy as far as the construction of the word "seamen" is concerned. The decision in the *Anderson* case was shortly followed by a decision of the Seventh Circuit in the case of *Walling, Administrator,* v. *Great Lakes Dredge and Dock Company,*[19] wherein dredge employees were held not to be seamen and, therefore, within the coverage of the Fair Labor Standards Act of 1938. This case was followed by the opinion of the First Circuit in the case of *Bay State Dredging and Contracting Company* v. *Walling, Administrator,*[20] holding that dredging employees were not seamen within the meaning of the Act.

It is, therefore, relatively evident that there is now existing a conflict within the various Circuit Courts of Civil Appeal as to the proper construction of the term "seamen" as used in the Fair Labor Standards Act of 1938. The courts in construing the term in the three (3) latter cases above mentioned have stated that the term must be construed in its ordinary meaning and the Circuit Court of Appeals in the instant case so stated,[21] yet such courts have disregarded the ordinary meaning of the term as established by all of the prior decisions of the Supreme Court and Circuit Courts of Appeals.

Even now, there exists a conflict within the executive departments of the Government on this particular question. The Treasury Department, in its interpretative bulletin, issued January 17, 1946, by the Office of Commissioner of Internal Revenue (A & C, Coll. No. 5976), has ruled that employees on dredge-boats are "members of the crew of a vessel" in interpreting the exemption contained in Social Security Act (Sec. 811 (b)(5)), and the Internal Revenue

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[19] 149 Fed. (2d) 9 (C. C. A. 7).

[20] 149 Fed. (2d) 346 (C. C. A. 1).

[21] Record, p. 113.

Code (Sec. 1426 (b)(5)). This interpretation is in direct conflict with the interpretation of such similar exemption in the Fair Labor Standards Act of 1938 by the Labor Department, under consideration herein.

The result obviously has been the creation of a state of confusion among employers and employees engaged in dredging activities, which confusion will not be abrogated until the Supreme Court speaks upon such question.

Point II

The Circuit Court of Appeals for the Fifth Circuit in its opinion in the instant case established a theory on the interpretation of the exemption contained in Section 13 (a) (3) of the Fair Labor Standards Act of 1938, which has never heretofore been advanced by this Court or any Circuit Court of Appeals and which establishes a rule of Federal law tending to further confuse the issue as to such exemption and contrary to prior decisions of this Court and other Circuit Courts of Appeal.

In its opinion the Circuit Court of Appeals stated:

> "If the exemption were of all seamen, we should be inclined to hold as did the District Court, that these men are seamen." [22]

The court then proceeds to contend that, notwithstanding such opinion, the dredge-boat employees are not "employees employed as seamen" within the terms of the Act, on the theory that such words "are not mere tautology." [23] This presents a theory never before advanced in the construction of the term seamen in this Act or any other Act. This theory was not advanced by the Wage and Hour Division of the Department of Labor, appellant in the case below,

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[22] Record, p. 113.

[23] Record, p. 114.

nor was such interpretation ever argued to either the District Court or the Circuit Court of Appeals. To say in one breath that a certain category of employees are seamen by virtue of the work they do, and in the next breath to say that they are not "employed as seamen" is, we feel, a conflict within itself, which will have the effect of further confusing the issue before the applicable employers and employees involved.

The vast number of industries in the coastal and river areas of the United States that are subject to the applicable provisions of this Act, as they particularly pertain to the exemption under consideration, are consequently placed in an even more precarious position as to the method of proceeding under such Act. The courts have never before had before them a case involving employees who dredge for oyster shell on the Gulf Coast, although the industry is a vastly important one in the economic life of the states surrounding the Gulf of Mexico. The fact that a great number of individuals is so affected warrants this court in taking jurisdiction of the matter to the end that the question involved may be ruled upon by the highest tribunal of this land to forever establish a rule of law to guide affected parties and prevent undue litigation.

Respectfully submitted,

W. P. Hamblen,
Counsel for Petitioner.